No. 10052

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MYRTLE D. A. PECK,

Appellant,

vs.

FRANCES HOWARD and FRED HOWARD,

Appellees.

APPELLANT'S REPLY BRIEF.

JAMES P. CLARK,
706 Grant Building, Los Angeles,
Attorney for Appellant.

Parker & Baird Company, Law Printers, Los Angeles

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

CASES.

STATUTES.

TEXTBOOKS.

No. 10052

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MYRTLE D. A. PECK,

Appellant,

vs.

FRANCES HOWARD and FRED HOWARD,

Appellees.

APPELLANT'S REPLY BRIEF.

Restatement of Case as to Ownership of and Possession of Right of Way, Pipe Line and Water by Appellant.

The verified petition of appellant, which was the only evidence before the court, states that appellant was the owner of and in possession of the right of way, crossing appellees land, the pipe line on said right of way and the water flowing therethrough [Tr. pp. 12-13] and that she and her predecessors have owned and maintained said pipe line for more than forty years last past [Tr. p. 13] and also the springs supplying water for said pipe line. That at the date of the appropriation of the water in question and the completion of the pipe line July 1, 1895, the forty acres of land owned by appellees was a part of

the public domain and that by reason of the construction of the pipe line at that time Henry Hatch, a predecessor in interest of appellant acquired a vested right of way over and across the forty acres of land now owned by appellees. [Tr. pp. 13-14.] That it was not until afterwards and in December, 1895 or January, 1896 that appellees' predecessor in interest settled on the forty acres now owned by appellees and that when patent was issued September 3, 1904 it contained specific exemptions in favor of any rights for ditches carrying water and appropriation made while the same was Government land. [Tr. p. 14.] Various trespasses committed by appellees on the right of way, pipe line and water flowing therethrough are set forth, culminating in the suit by appellant against appellees October 1, 1940. [Tr. p. 15.] This was an action to enjoin appellees from such continuous trespasses, for costs and damages. [Tr. p. 16.]

A preliminary injunction was granted November 1, 1940, restraining and enjoining appellees "from the further or any use of the waters belonging to appellant and flowing through said pipe line", except for household use and a reasonable amount to sprinkle the lawn at the house belonging to appellees. [Tr. p. 16.]

This restraining order to be in effect pending the trial of said action. [Tr. p. 16.] Then follows the statement of the other matters contained in appellant's petition.

Erroneous Claims and Over Statements in Appellees' Brief.

(a) Under the head "Statement of Case", page 5 of their brief, after stating ownership and possession of their 40 acres of land and its use in raising turkeys, chickens, etc., say

> "together with the possession of, and right to use all water necessary for domestic as well as agricultural purposes, from a certain pipe line running across their land, which carries water from certain springs [Tr. pp. 14-15]."

There is not a scintilla of evidence in the record to support this statement. The reference to the transcript made is to pages 14 and 15 of appellant's petition, and refutes instead of supporting such a claim. Appellees must have forgotten the preliminary injunction made by the Superior Court, November 1, 1940. It cannot be presumed that they are now violating it, and they certainly could not predicate any rights on such violation. The limited use allowed by the court, pending trial was permissive and clearly did not create any rights in appellees, and terminates with the trial of the action.

(b) Again at page 21 of appellees' brief they say

> "our case is entirely different, in that the so-called adverse claimant (appellant) admits that appellees are using the water, and are in possession of the water on their own land, and claim ownership in and to the right to use the water."

There is no such admission and nothing in the record to support it. Certainly no such inference or presumption could flow from the nature of the action brought in the

Superior Court, which is primarily one to restrain appellees from committing trespass, and incidentally for damages and costs. It is true that plaintiff does ask to have her title quieted against appellees. An action of trespass is based more on the possession of plaintiff, than her title and the allegation of possession is an essential allegation. Appellant claims both ownership and possession, and there is no room for a presumption against her on that point. One who commits a trespass, does not thereby acquire rights in the property, unless by adverse possession for 5 years under the statute. An action to quiet title is under a claim of title and possession. So there is no presumption here. Since the statute of California was amended, one out of possession might maintain the action, where the complaint contains appropriate allegations. But here the adverse claimant (the appellant), sets out that she was the owner and in possession, and she does not by inference, presumption or otherwise admit that the appellees are in possession nor that they claim ownership.

(c) Appellees under head "Statement of Case", page 5 of their brief, states,

> "Appellees were not served with a copy of said petition, hence knew nothing of the petition, and no answer thereto was filed".

And cites in support of this statement of counsel, another statement of same counsel at Tr. p. 48. This is certainly pulling oneself up by the boot straps. However, counsel is mistaken in this. The affidavit of service shows service in the manner provided by law on appellees on November 17th, 1941 by mail, and personally on their attorney on the following day. [Tr. pp. 21-22.] (*Code of Civil Procedure of California,* Sections 1012-1013.)

(d) We now come to a very twisted and distorted statement, claimed at page 6 of appellees' brief, to have been made by the Superior Court judge, when the hearing was postponed on May 26th, 1941, the day this petition in bankruptcy was filed. The judge did say that he would postpone the case from time to time and so long as it might be necessary, so that the trial of the case (which was then nearly finished) might be concluded, but he did not say "and that he not only would render judgment for appellant, etc.", and made no statement from which this could be inferred. The judge did say that if a long time elapsed before the hearing he would entertain a motion to amend the complaint, asking for additional damages, if the plaintiff (appellant) so elected. Counsel cites Tr. p. 66 in support of the statement in the brief; this is but another statement of some counsel at the hearing, but even this statement did not claim that the judge said "and he would not only render judgment for the appellant", etc. This reminds the writer of a saying of Josh Billings, "that a lot of folks know facts, that aint so". Counsel rounds out his statement on the same page of his brief with the statement: "This was one of the reasons the Court refused to exercise its discretion to permit the State Court to try the matter." [Tr. pp. 60-61.] At the pages of the transcript referred to the Court and appellant's counsel were discussing the law and there is nothing here to support the above conclusion. In fact much later in the record and at Tr. p. 66 counsel for appellees made the statement above referred to. A very improper statement, even if true, which it was not, and obviously made to create a prejudice against the trial judge in the Superior Court. We doubt that it had this effect.

ARGUMENT.

I.

Whatsoever the Exclusive Jurisdiction Conferred by Congress on the Bankruptcy Court and Control of the Bankrupt and His Property, This Does Not Give it Control of or Right to Decide the Rights of Adverse Third Parties.

On this subject we refer to the cases cited at pages 12-16 of our opening brief.

In the case of *Forest Fur Farms of America,* 122 Fed. (2d) 232, 245, the Court in deciding that the state court had jurisdiction, said:

> "In considering the question of jurisdiction, we have borne in mind that 'due regard for the rightful independence of state governments, which should actuate federal courts, require that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' Shamrock Oil & Gas Corporation v. Sheets, 61 S. Ct., 868, 872, 85 L. Ed. 1214, decided April 28, 1941; Healy v. Ratta, 292 U. S. 263, 54 S. Ct. 700, 78 L. Ed. 1248."

In re Lowmon, 79 Fed. (2d) 887 (a proceeding under Sec. 75), at p. 891, the court said:

> "We think there is nothing in the constitutional clause conferring on Congress the control over bankruptcy, which authorizes it to change property rights already created by the states. Under the proper exercise of that power, federal courts may be authorized to assume jurisdiction over and to administer property of the bankrupt, but they must administer that property as they find it and they have no power to create

new rights in it for the benefit of either the debtor or creditor." (*Board of Trade of Chicago v. Johnson,* 264 U. S. 1.)

In the case of *Smith v. Chase Natl. Bank etc.,* 84 Fed. (2d) 608, Judge Sanborn at page 615, said:

> "The bankruptcy act confers on the District Courts, as courts of bankruptcy, jurisdiction at law and in equity, which enable them to exercise original jurisdiction in bankruptcy proceedings. As courts of bankruptcy they are vested with power, to collect, reduce to money and distribute the estate of the bankrupt and to determine controversies in relation thereto. We think it clear that the *controversies* referred to relate to the collection sale and distribution of such estates. The jurisdiction of the District Courts, as granted by the bankruptcy act, is *unquestionably bankruptcy jurisdiction and not general jurisdiction* to hear and determine controversies between adverse third parties, which are not strictly and properly a part of the bankruptcy proceeding." (Italics ours.)

II.

The Petition for Leave to Proceed in the State Court Did Not Call for a Reference to or Report by Conciliation Commissioner.

Appellees contend under Point II, page 16 of their brief that such a reference is necessary and the bankruptcy court seemed to agree with them as far as the discussion of his views are set out in the reporter's transcript. However, appellant is satisfied that the *McFarland* case cited in our brief and discussed by counsel for appellees, decides this point against them, and the cases cited in our opening brief have not been met.

III.

Bankruptcy Court Is Without Jurisdiction to Determine Adverse Claim of Third Party to Property in the Possession of Such Claimant.

On this point appellant is content to rest upon the cases herein above cited and cases in opening brief beginning at page 12 of that brief. The argument of counsel for appellees and citations of cases, do not meet or rebut the cases cited by appellant. In an attempt to evade the force of these cases appellees under Point VI, page 21 of their brief, *et seq.* take the position that the District Court had a right to make inquiry to ascertain if the adverse claim of appellant was real and substantial or merely colorable. Does not this contention beg the question and is it sincere? Appellees have all along heretofore contended that the bankruptcy court had complete and exclusive jurisdiction to determine the matter of appellant's claims and not that it should first determine whether appellant's claim was real or colorable and "if found to be real, and substantial, it must decline to determine the merits and dismiss the summary proceedings." (Appellees' Br. p. 22.) Nor was this the purpose of the reference made by the court. The order referred the petition of appellant to the commissioner "with plenary power and authority to proceed to hear and determine the issues that are presented by said petition." This is not a reference to the commissioner "for a hearing and report", nor to determine whether appellant's claim was "real or colorable", but with plenary power to hear and determine.

Plenary is defined by Black's Law Dictionary (p. 1367, Vol. 3, 3rd Ed.) as "Full, entire, complete, unabridged."

And Bouvier's Law Dictionary, Vol. 3, p. 2612 (3rd Ed.) as "full, complete," and says:

> "In the courts of admiralty and in the English ecclesiastical courts causes of suits in respect to the different course of proceedings, in each are termed plenary and summary. *Plenary or full and formal suits are those in which the proceedings must be full and formal,* and the term summary is applied to those causes where the proceedings are more succinct and less formal. 2 Chitty Pr. 481."

Where a claim comes up that is adverse and is something new, the court may well and probably should put on foot an inquiry as to whether it was a real claim or merely colorable, but when it has been made to appear to the District Court that this adverse claim has stood the fire and test of two trials in the State court, this should establish the fact that it is very real and substantial and not merely colorable. Probably this question never suggested itself to the mind of the district judge, but he was under the impression that the real merits of the issues should be tried in the bankruptcy court, and the suggestion now made by counsel for appellees that the District Court had the right to ascertain that question, is purely an afterthought.

IV.

It Appearing From the Record, That Appellant and Appellees Are Residents and Citizens of the State of California, the Bankruptcy Court Could Not Try the Issue on the Merits Without Consent of Appellant.

Appellees have made no effective reply to this point set in appellant's opening brief Point III, page 16, and the authorities cited.

V.

Reply to Contention of Appellees That Appellant Has Admitted Jurisdiction of Bankruptcy Court Under Point VIII, Page 25, Is Without Merit.

Instead of the very scrambled and inaccurate statement by appellees as to what the action of the appellant is and was in the State court, we refer the court to the petition of appellant [Tr. pp. 12-19], which shows that it was an action brought to restrain trespass, and for damages and costs. And sets out the fact that the appellant was the owner of and in possession of the *res* involved herein; and also sets out the preliminary injunction granted by the State court against appellees. The complaint asked the added relief of quieting title against any of the claims of appellees, which were alleged to be without right or merit. This is certainly not an admission that appellants have any ownership right, title, claim or demand in or to the *res* or possession of same. But ownership and possession is affirmatively claimed by appellant.

Conclusion.

The only evidence before the district judge was the verified petition of appellant. This was served in ample time to have permitted an answer. None was made. Why? The case in the State court had been continued to November 25th, 1941, which was the day following hearing on petition. [Tr. p. 17.] The appellant is now and for many years last past has been the owner and in possession of the *res,* and should be permitted to conclude this second trial in the State court and bring a very expensive and tedious litigation to an end.

Respectfully submitted,

James P. Clark,
Attorney for Appellant.